Court File No. 35492

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

WHITE BURGESS LANGILLE INMAN, CARRYING ON BUSINESS AS WBLI CHARTERED ACCOUNTANTS and R. BRIAN BURGESS

Appellants
(Respondents)

-AND-

ABBOTT AND HALIBURTON COMPANY LIMITED; A.W. ALLEN & SON LIMITED; BERWICK BUILDING SUPPLIES LIMITED; BISHOP'S FALLS BUILDING SUPPLIES LIMITED; ARTHUR BOUDREAU & FILS LTÉE; BRENNAN CONTRACTORS & SUPPLIES LTD.; F. J. BRIDEAU & FILS LIMITEE; CABOT BUILDING SUPPLIES COMPANY (1988) LIMITED; ROBERT CHURCHILL BUILDING SUPPLIES LIMITED; CDL HOLDINGS LIMITED, FORMERLY CHESTER DAWE LIMITED; FRASER SUPPLIES (1980) LTD.; R. D. GILLIS BUILDING SUPPLIES LIMITED; YVON GODIN LTD.; TRURO WOOD INDUSTRIES LIMITED/HOME CARE PROPERTIES LIMITED; HANN'S HARDWARE AND SPORTING GOODS LIMITED; HARBOUR BRETON BUILDING SUPPLIES LIMITED; HILLIER'S TRADES LIMITED; HUBCRAFT BUILDING SUPPLIES LIMITED; LUMBERMART LIMITED; MAPLE LEAF FARM SUPPLIES LIMITED; S. W. MIFFLIN LTD.; NAUSS BROTHERS LIMITED; O'LEARY FARMERS' CO-OPERATIVE ASS'N., LTD.; PELLERIN BUILDING SUPPLIES INC.; PLEASANT SUPPLIES INCORPORATED; J. I. PRITCHETT & SONS LIMITED; CENTRE MULTI-DECOR DE RICHIBUCTO LTÉE; U. J. ROBICHAUD & SONS WOODWORKERS LIMITED; LA QUINCAILLERIE SAINT-LOUIS LTÉE; R & J SWINAMER'S SUPPLIES LIMITED; 508686 N.B. INC. OPERATING AS T.N.T. INSULATION AND BUILDING SUPPLIES; TAYLOR LUMBER AND BUILDING SUPPLIES LIMITED; TWO BY FOUR LUMBER SALES LTD.; WALBOURNE ENTERPRISES LTD.; WESTERN BAY HARDWARE LIMITED; WHITE'S CONSTRUCTION LIMITED; D. J. WILLIAMS AND SONS LIMITED; AND WOODLAND BUILDING SUPPLIES LIMITED.

Respondents
(Appellants)

FACTUM
OF WHITE BURGESS LANGILLE INMAN, CARRYING ON BUSINESS AS WBLI CHARTERED ACCOUNTANTS and R. BRIAN BURGESS, APPELLANTS
(Pursuant to Rules 35 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This appeal raises issues of central importance to the administration of justice in Canada, the fair adjudication of litigation disputes, and the critical gatekeeper role of Canadian judges in excluding improper and inadmissible expert evidence at trial and on motions. The main question for this Honourable Court to determine is whether a Canadian court should exclude the proposed evidence of an expert witness who, as in the within case, lacks the requisite independence to qualify as an expert witness.

2. The Plaintiffs in this action (Respondents on this appeal) filed an affidavit from a proposed expert, Susan MacMillan, a partner of the national accounting firm of Grant Thornton LLP ("**Grant Thornton**").[1] Ms. MacMillan was retained by the Plaintiffs' litigation consultant to opine on the accounting and auditing standards applied by the Defendants/Appellants, White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants ("**WBLI**"), and its senior audit partner R. Brian Burgess, including whether WBLI or Ms. MacMillan's own partners in a nearby Grant Thornton office, in an adjacent town, applied the correct accounting and auditing standards for certain year-end financial statements that are in issue in these proceedings.

3. The Honourable Justice Arthur W.D. Pickup (the "**Motions Judge**"), on a preliminary motion to a summary judgment motion brought by WBLI, struck Ms. MacMillan's proposed expert affidavit (the "**MacMillan Affidavit**") in its entirety on the primary basis that Ms. MacMillan lacked the requisite independence to meet the threshold for admissibility.[2] In doing so, His Honour, in Reasons dated June 1, 2012, relied on the well-established Canadian jurisprudence on the need for expert witnesses to be independent in order for their evidence to be admissible.

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[1] Affidavit of Susan Dorothy MacMillan sworn September 16, 2010 [MacMillan Affidavit], Appellants' Record, Vol. II, Tab III-C

[2] Reasons of the Hon. Mr. Justice Pickup dated June 1, 2012 at para. 106 [Decision of the Motions Judge], Appellants' Record, Vol. I, Tab I-B

4. The Motions Judge rejected the Respondents' arguments that any concerns about Ms. MacMillan's independence and impartiality should "go only to weight"[3] and properly concluded that the "ramification of not allowing a motions judge to strike such evidence, in the clearest of cases, is that the court will lose the benefit of the summary judgment process."[4] The Motions Judge concluded that "this is one of those clearest of cases where the ***reliability*** of the expert is so impugned that their evidence does not meet the threshold requirements for admissibility" and "the motion to strike remedy is warranted" (emphasis added).[5]

5. On appeal before the Nova Scotia Court of Appeal, in a dissenting set of Reasons, Chief Justice MacDonald agreed with the decision of the Motions Judge in its entirety, concluding that the Motions Judge had properly articulated the relevant Canadian legal principles surrounding the admission of expert evidence and had properly applied these principles.[6]

6. However, contrary to a long line of Canadian jurisprudence, the majority of the Nova Scotia Court of Appeal disagreed with the Motions Judge's decision in the court below and reversed it on the reasoning that "[t]here is no stand-alone requirement for a party to demonstrate that its expert witness is, or appears to be independent."[7] The Nova Scotia Court of Appeal's decision and its rationale that expert witnesses need not be "independent" ignores the requirements of impartiality and cannot be reconciled with the modern day role of expert witnesses as articulated by courts throughout the country, several studies and reports on court reform,[8] and as set out expressly in some civil procedure rules, including those of Nova Scotia,[9] and expert professional conduct standards, including those governing accountants, like Ms. MacMillan, who testify as expert witnesses.[10]

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[3] Decision of the Motions Judge at para. 70, Appellants' Record, Vol. I, Tab I-B, p. 33

[4] Decision of the Motions Judge at para. 98, Appellants' Record, Vol. I, Tab I-B, p. 45

[5] Decision of the Motions Judge at paras. 102-106, Appellants' Record, Vol. I, Tab I-B, pp. 47-49

[6] Reasons for Judgment of the Chief Justice of Nova Scotia MacDonald, Mrs. Justice Oland and Mr. Justice Beveridge of the Nova Scotia Court of Appeal dated May 24, 2013 at para. 43 [Court of Appeal Reasons], Appellants' Record, Vol. I, Tab I-D, p. 72

[7] Court of Appeal Reasons at para. 161, Appellants' Record, Vol. I, Tab I-D, p. 102

[8] See paras. 47-49, below

[9] The rules of court in seven provinces provide that experts are required to be impartial and the rules in several provinces expressly advert to the expert's duty to assist the court. See *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r 11-2(1); *Court of Queen's Bench Rules*, Sask Gaz December 27, 2013, 2684, r 5-37(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr 4.1.01(1) and 53.03(1); *Code of Civil Procedure*, CQLR, c. C-25, art 418; *Nova Scotia Civil Procedure Rules*, Royal Gaz

B. BACKGROUND TO THIS APPEAL

i. The Respondents' Claim for Negligent Misrepresentation

7. The Respondents commenced the within action in September, 2006. They framed the action as a claim for negligent misrepresentation against the Appellants, the accounting firm WBLI and its senior audit partner Mr. Burgess, in their capacity as auditors for A.W.A.R.D. Wholesale and Retail Distributors Limited ("**AWARD**").[11]

8. AWARD was a collective buying group comprised of building supply stores located throughout Atlantic Canada. The Respondents are independently-owned building, lumber and/or hardware supply stores, and former members and shareholders of AWARD. By purchasing in bulk through AWARD, the Respondents were able to earn supplier rebates that they were unable to earn as independent purchasers. As the principal purchaser for the buying group, AWARD was liable for the payment of all of the supplier invoices and accordingly owned all of the volume rebates earned through its purchases. AWARD was structured as a non-profit corporation and, as such, did not retain any earnings or deficits but rather served as a conduit or "flow through" that passed any such earnings and deficits on to its members/shareholders.[12]

9. Following the decision to wind down the company, the Respondents alleged that WBLI and Mr. Burgess negligently conducted and prepared the audits and audited financial statements of AWARD by failing to apply the requisite standards for audits, including Generally Accepted Auditing Standards ("**GAAS**") and General Accepted Accounting Principles ("**GAAP**"). The Respondents claim that the audited financial statements of AWARD did not truly reflect the financial condition of the company and further that WBLI

Nov 19, 2008, rr 55.01 and 55.04(1); *Rules of Civil Procedure*, PEI Rules, rr 4.1.01(1) and 53.03(1); and *Rules of Court for the Supreme Court of Yukon*, YOIC 2009/65, r 34(23)

[10] See paras. 23-24, below

[11] Originating Notice filed September 6, 2006, Appellants' Record, Vol. I, Tab II-A; Further Amended Statement of Claim filed December 18, 2006 at paras. 8 and 10 [Amended Claim], Appellants' Record, Vol. I, Tab II-F, pp. 159-161; Decision of the Motions Judge at para. 1, Appellants' Record, Vol. I, Tab I-B

[12] Affidavit of R. Brian Burgess, sworn August 13, 2010 [Burgess Affidavit] at paras. 30-34 and 39, Appellants' Record, Vol. II, Tab III-B, pp. 21-22 and 25. Not all of the former members of AWARD joined the action (the Respondents are 38 of approximately 55 former members/shareholders). See Amended Claim at para. 1, Appellants' Record, Vol. I, Tab II-F, pp. 149-150

failed to maintain professional independence from AWARD and its management.[13] The Respondents alleged that the AWARD audits were conducted negligently, including, it is alleged, because of a failure to establish an allowance for doubtful accounts; to recognize debts that had extinguished, forgivable loans, and long term debt owing to AWARD; to present salary expenses appropriately; to recognize misallocation of rebates from manufacturers and distributors owing to AWARD shareholders; to recognize and present interest owing on doubtful accounts; and to provide appropriate explanatory notes and qualifications to the notes.[14] Despite the fact that WBLI were the auditors for AWARD, not the members/shareholders of AWARD, the Respondents (who were members/shareholders of AWARD) claim that they relied on AWARD's audited financial statements, (i) to make personal investment decisions as to whether to continue their participation in AWARD; and (ii) to exercise informed and timely control over AWARD.[15] The Respondents assert that they suffered personal economic losses, including the loss of supplier rebate payments and amounts they were required to pay for AWARD's indebtedness when AWARD ceased operations and wound down in late 2005.[16]

10. WBLI had been appointed as auditors for AWARD for the year-ended 2005 but were terminated without notice in or around November 2005.[17] The chairman of AWARD's board of directors said on discovery that he relied on the advice of their new accountants, Grant Thornton, in making the decision to terminate WBLI as auditors.[18] The accounting/audit work of Grant Thornton was also the catalyst and a key foundation for this lawsuit against WBLI.[19] Yet in the context of this litigation, Ms. MacMillan, despite being a partner in Grant Thornton, purported to reach independent "expert" conclusions that WBLI erred in applying GAAS and GAAP on several of the items identified by her partners in Grant Thornton, acting

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[13] Amended Claim at para. 8, Appellants' Record, Vol. I, Tab II-F, pp. 159-160

[14] Amended Claim at paras. 10-11, Appellants' Record, Vol. I, Tab II-F, pp. 160-162

[15] Amended Claim at paras. 13-16, Appellants' Record, Vol. I, Tab II-F, pp. 162-164

[16] Burgess Affidavit at para. 49, Appellants' Record, Vol. II, Tab III-B, p. 27; Amended Claim at para. 16, Appellants' Record, Vol. I, Tab II-F, p. 164

[17] Burgess Affidavit at paras. 124-125, Appellants' Record, Vol. II, Tab III-B, p. 47

[18] See Exhibit 1 to the MacMillan Cross-Examination, Tab 25: Excerpts from the Examination for Discovery of Kevin Pritchett held November 7-9, 2007 [the Pritchett Examination] at pp. 64-66, Appellants' Record, Vol. IV, Tab IV-1-Y, pp. 111-113; for a description of Mr. Pritchett's roles with AWARD, see the Burgess Affidavit at para. 4, Appellants' Record, Vol. II, Tab III-B, p. 14

[19] See para. 17, below

in their capacity as AWARD's new independent accountants, including the collectability of former member accounts, the application of GAAP in the treatment of credit losses against former member receivables, and the reporting of certain supplier rebates as a reduction in former member accounts.[20] As was found by the Motions Judge, Ms. MacMillan did not, in fact, reach these conclusions independently.[21]

ii. The Motion Giving Rise to this Appeal

11. The Appellants WBLI and Burgess have maintained throughout the underlying proceedings that for various reasons this claim has absolutely no merit, including because no duty of care was owed to the Respondents but, in any event, the Appellants were not negligent in their role as auditors and met the applicable standard of care of reasonable auditors in the circumstances and applied all the appropriate standards for a "flow through" entity such as AWARD, where any liabilities were ultimately the responsibility of its members (the Respondents herein).[22]

12. Accordingly, WBLI brought a motion for summary judgment on August 13, 2010, to dismiss these proceedings in their entirety, relying primarily on an affidavit sworn by Mr. Burgess as the WBLI audit partner and admissions made by the Respondents in discoveries to date.[23] The principal grounds for the motion were that there was no duty of care owed to the Plaintiffs as members/shareholders of AWARD and, in any event, there was no basis for the claims of negligence. In his affidavit, Mr. Burgess addressed each and every allegation of negligence pleaded against his firm and set out a clear evidentiary record as to why the Appellants were not negligent and met the standard of care for auditors in the circumstances.[24]

13. In their response to the motion for summary judgment, the Respondents filed the affidavit of Ms. MacMillan, as a purported "independent expert" witness in accounting and

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[20] MacMillan Affidavit at para. 76, Appellants' Record, Vol. II, Tab III-C, pp. 71-72

[21] See paras. 32-33, below; Decision of the Motions Judge at para. 102, Appellants' Record, Vol. I, Tab I-B, p. 47

[22] Defence filed December 4, 2006, Appellants' Record, Vol. I, Tab II-D

[23] Notice of Motion dated August 12, 2012, Appellants' Record, Vol. I, Tab II-G

[24] Burgess Affidavit, Appellants' Record, Vol. II, Tab III-B

audit standards.[25] As set out above, Ms. MacMillan is a partner with the national accounting firm of Grant Thornton, the firm that replaced WBLI as the auditors to AWARD. The Appellants immediately brought a motion to strike the MacMillan Affidavit on the grounds that Ms. MacMillan lacked the requisite independence to testify as an expert, because the work of her own partners, as AWARD's accountants and auditors, and inevitable fact witnesses in this matter, formed the basis for the Respondents' claim. It became clear, based on Ms. MacMillan's affidavit and her evidence on cross-examination, that she was in an irreconcilable conflict of interest between her duty to the court to give objective and impartial opinion evidence, and her duty to her partners, not to expose them to liability in connection with their opinions to AWARD, if she disagreed with their previously prepared opinions and "independent" accounting and auditing work. The motion to strike the MacMillan Affidavit is the motion giving rise to this Appeal.[26]

C. THE MACMILLAN AFFIDAVIT

iii. Grant Thornton's Role in These Proceedings Prior to MacMillan Retainer

14. During the wind down of AWARD, Grant Thornton was retained in 2005 to replace WBLI as auditors to AWARD and to conduct an independent review engagement with respect to AWARD's financial statements for the year ended December 31, 2005 (the "**2005 Review Engagement**").[27] As defined by the Canadian Institute of Chartered Accountants (the "**CICA**") in its handbook of standards and guidelines for assurance engagements (the "**CICA Handbook**"), which has been adopted by the Institute of Chartered Accountants of Nova Scotia (the "**ICANS**"), a review engagement is required to be an ***independent*** engagement conducted by a professional accountant, wherein the accountant reviews a company's financial statements, makes inquiries of and has discussions with management, and

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[25] The Respondents also filed a fact affidavit that was struck by the Motions Judge. See Decision of the Motions Judge at para. 56, Appellants' Record, Vol. I, Tab I-B. The Court of Appeal refused to grant leave to appeal with respect to that decision. See Court of Appeal Reasons at paras. 17 and 73, Appellants' Record, Vol. I, Tab I-D, pp. 59 and 81

[26] Notice of Motion dated March 7, 2012, Appellants' Record, Vol. I, Tab II-H

[27] Burgess Affidavit at para. 125, Appellants' Record, Vol. II, Tab III-B, p. 47; Exhibit 1 to the MacMillan Cross-Examination, Tab 26: Copy of a letter from Brian Murphy to Alan D'Silva dated April 21, 2009, enclosing engagement letters and reports completed by Grant Thornton, Appellants' Record, Vol. IV, Tab IV-1-Z

undertakes certain analytical procedures, to provide a moderate level of assurance as to whether the company's financial statements are "plausible" in the circumstances.[28]

15. In the course of conducting the 2005 Review Engagement, partners from Grant Thornton's Kentville office also revised and restated AWARD's 2004 audited financial statements and the audit opinions that WBLI had prepared for the 2004 fiscal year end financial statements (the "**2004 Restated Financials**"). As reflected in the various accounting standards of the profession and the relevant jurisprudence, in contrast to a review engagement, an audit requires the accountant to undertake additional and more stringent analytical procedures such as inspection, observation, confirmation, recalculation and re-performance so as to enable the accountant to provide the highest reasonable level of assurance that the company's financial statements are not false or misleading. Grant Thornton was required to conduct and prepare the 2005 Review Engagement and the 2004 Restated Financials on an independent, impartial and objective basis.[29] These engagements and opinions were obviously not prepared for the litigation and were required to be prepared in an ***independent*** and ***unfettered*** manner.[30] Grant Thornton's work for AWARD required that Ms. MacMillan's partners at Grant Thornton be and remain independent, impartial and objective at all times.

16. Subsequent to conducting these independent reviews, being the 2005 Review Engagement and the 2004 Restated Financials, Grant Thornton was retained to perform certain specified accounting procedures in April 2006, and delivered their report in July 2006; the object of this report was to summarize the value of supplier rebates credited to (1) the

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[28] Assurance engagement is defined in section 5025 of the CICA Handbook to include review engagements. This definition is adopted by the ICANS, as per its council interpretations relating to independence. See Exhibit 1 to the MacMillan Cross-Examination, Tab 13: CICA Handbook, s. 5025, Appellants' Record, Vol. IV, Tab IV-1-M, p. 62; and Exhibit 1 to the MacMillan Cross-Examination, Tab 9: Excerpt from ICANS' Council Interpretations, s. 21, Appellants' Record, Vol. IV, Tab IV-1-I, p. 52

[29] MacMillan Cross Examination at pp. 79-83, Appellants' Record, Vol. III, Tab III-E, pp. 82-86; see also, Exhibit 1 to the MacMillan Cross-Examination, Tabs 8 to 13: Excerpt from ICANS' Rules of Professional Conduct; Excerpt from ICANS' Council Interpretations; Excerpt from CICA Handbook – Assurance (2010 Edition) – Ethical Requirements; Excerpt from CICA Handbook – Assurance (2010 Edition) – Standards Applicable to Review Engagements; Excerpt from CICA Handbook – Assurance (2010 Edition), s. 9100 re: Specified Auditing Procedures; Excerpt from CICA Handbook – Assurance (2010 Edition), s. 5025 re: Standards for assurance engagements other than audits; Appellants' Record, Vol. IV, Tabs IV-1-H to IV-1-M

[30] For example, as set out in the relevant accounting and auditing standards, and as acknowledged by Ms. MacMillan on cross-examination, auditors have a duty to restate financial statements when they come to the conclusion that a previous year's audited financial statements are materially inaccurate. See MacMillan Cross-Examination at p. 89, Appellants' Record, Vol. III, Tab III-E, p. 92

outstanding accounts of former members and (2) advertising expenses, and to quantify AWARD's alleged deficit as at December 31, 2005 (the "**Special Procedures Report**" or "**SPP Report**").[31] For the purpose of the Special Procedures Report, Grant Thornton was retained by "The AWARD Legal Fund",[32] which was the fund created to advance the within litigation on behalf of some of the AWARD members/shareholders. On cross-examination, Ms. MacMillan considered the Special Procedures Report to be just another report that was done by Grant Thornton and subject to the applicable CICA requirements of objectivity and independence.[33]

17. The Motions Judge recognized that the previous independent work conducted by Grant Thornton's Kentville office served as a catalyst and foundation for the claim of negligence against WBLI. First, the Further Amended Statement of Claim (the "**Amended Claim**"), at paragraph 12, expressly refers to the 2005 Review Engagement conducted by Grant Thornton and the purported differences between Grant Thornton's work and the audited financial statements prepared by WBLI for the year-ended December 31, 2004.[34] The Amended Claim expressly states that there are "numerous differences" between the two firms' work, and that "the negligence of WBLI in the preparation of AWARD's financial statements for the material period of time resulted in the representation that AWARD was a profitable company when in fact it was not profitable and was operating in a materially significant deficit position."[35] Second, as referenced by the Motions Judge, "during discoveries, counsel for the Respondents stated that the work conducted by Kentville Grant Thornton 'does form part of the negligence claim.'"[36]

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[31] Exhibit 1 to the MacMillan Cross-Examination, Tab 26: Copy of a letter from Brian Murphy to Alan D'Silva dated April 21, 2009, enclosing engagment letter and reports completed by Grant Thornton, Appellants' Record, Vol. IV, Tab IV-1-Z; see pp. 116-120 for the retainer letter and following for the Special Procedures Report

[32] Exhibit 1 to the MacMillan Cross-Examination, Tab 26: Copy of a letter from Brian Murphy to Alan D'Silva dated April 21, 2009, enclosing engagment letter and reports completed by Grant Thornton, Appellants' Record, Vol. IV, Tab IV-1-Z, p. 116

[33] MacMillan Cross-Examination at pp. 134-135, Appellants' Record, Vol. III, Tab III-E, pp. 137-138

[34] Amended Claim at para. 12, Appellants' Record, Vol. I, Tab II-F, p. 162

[35] Amended Claim at para. 12, Appellants' Record, Vol. I, Tab II-F, p. 162

[36] Decision of the Motions Judge at paras. 60-61, Appellants' Record, Vol. I, Tab I-B, pp. 29-30; see also, Exhibit 1 to the MacMillan Cross-Examination, Tab 25: Excerpts from the Pritchett Examination at pp. 8-9, 162-163 and 65-66, Appellants' Record, Vol. IV, Tab IV-1-Y, pp. 104-113; for a description of Mr. Pritchett's roles with AWARD, see the Burgess Affidavit at para. 4, Appellants' Record, Vol. II, Tab III-B, p. 14

18. In July 2009, Ms. MacMillan was retained by the Respondents as an independent expert to review the audited financial statements of AWARD. In September 2009, her retainer was extended to provide independent "litigation support services" regarding the alleged negligence of the Appellants.[37]

19. Based on the independent accounting and auditing work that had been performed by Grant Thornton, particularly since it was relied on and incorporated into the within Amended Claim, Grant Thornton was at all times precluded from acting as "independent" experts in this case. Indeed, when the Respondents contemplated and then pursued litigation on the basis of Grant Thornton's seemingly independent audit and review engagement work, then they could have considered retaining an expert from any accounting firm in Canada ***except*** Grant Thornton. In fact, on discovery, the chairman of AWARD stated that another national accounting firm, BDO Dunwoody LLP ("**BDO**"), had been retained as experts for the purpose of the litigation in the spring of 2006.[38] There was no explanation given post-discovery as to why BDO were not the Respondents' experts on the summary judgment motion.

20. Despite her obvious conflicting duties in this case, Ms. MacMillan purported to express an opinion that certain of the WBLI audits fell below the standard of care required for accountants. Ms. MacMillan expressed this opinion for several years, including fiscal years for which Grant Thornton had completed the 2005 Review Engagement and the 2004 Restated Financials, and in respect of which a direct comparison of the two firms' work would be required to resolve the issue of WBLI's alleged negligence.[39]

21. As a result, and as set out in more detail below, from the moment that Ms. MacMillan was retained by the Respondents as a purported "expert witness" in these proceedings, she was in an irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton with respect to the 2005 Review Engagement and the 2004 Restated Financials

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[37] See MacMillan Affidavit at para. 4, Appellants' Record, Vol. II, Tab III-C, p. 51; Exhibits 2 and 3 to the MacMillan Cross-Examination, Retainer letters dated July 2 and September 22, 2009, Appellants' Record, Vol. IV, Tabs IV-2 and IV-3

[38] Excerpt from the Pritchett Examination (November 8, 2007) at pp. 138-139, Appellants' Record, Vol. II, Tab III-D, pp. 137-138

[39] See MacMillan Affidavit at para. 76, Appellants' Record, Vol. II, Tab III-C, pp. 71-72

versus the actions taken and standard exercised by the Appellants with respect to the key financial statements for the critical 2004-2005 time period. In the words of the Motions Judge, ***"[t]he moment that work is put to the court*** as evidence ***Ms. MacMillan will be in an apparent conflict of interest***" (emphasis added).[40]

iv. MacMillan Had Actual Knowledge of Her Conflict

22. Ms. MacMillan is an experienced expert witness, and she acknowledged that she was fully aware of the professional standards and requirements that experts in litigation matters be independent.[41] Indeed, as set out below, in the course of being cross-examined on her affidavit, she eventually recognized and adverted to just how problematic her conflicted position had become in her own mind.

23. The ICANS is a self-governing provincial association of chartered accountants whose primary objectives include protecting the public interest by governing the actions of its members and enforcing its rules and by-laws. The ICANS Rules of Professional Conduct set out the professional standards required of public accountants and serve as a guide to the profession and a source of assurance to the public by prescribing standards of fitness, moral character and conduct for its members. They clearly set out requirements for independence, impartiality and objectivity governing review and audit engagements:

> **204.1** "A member or firm who engages or participates in an engagement:
>
> […]
>
> shall be and remain independent such that the member, firm and any members of the firm shall be and remain free of any influence, interest or relationship which, in respect of the engagement impairs the professional judgment or objectivity of the member, firm or a member of the firm of, which, in the view

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[40] Decision of the Motions Judge at para. 102, Appellants' Record, Vol. I, Tab I-B, p. 47

[41] According to Ms. MacMillan's evidence, she is a Chartered Accountant and Certified Forensic Investigator, and a member of various professional associations, including the ICANS, the CICA and the Association of Certified Forensic Investigators ("ACFI"). Ms. MacMillan is also a seasoned and experienced expert witness: she regularly acts as expert witness on matters of theft, fraud, accounting and loss quantification, and has given expert testimony in 12 cases. See MacMillan Affidavit at para. 1, Appellants' Record, Vol. II, Tab III-C, p. 50; Exhibit 1 to the MacMillan Affidavit, Curriculum Vitae of Susan D. MacMillan, FCA, CFE, CFI, Appellants' Record, Vol. II, Tab III-C-1; MacMillan Cross-Examination at pp. 50-51, Appellants' Record, Vol. III, Tab III-E, pp. 53-54

> of a reasonable observer, would impair the professional judgment or objectivity of the member, firm or member of the firm."[42]

24. The requirements for accounting/litigation expert witnesses to be independent, impartial and objective has been expressly adopted by the CICA Alliance for Excellence in Investigative and Forensic Accounting (the "**IFA Alliance**"), which was created to establish a specialist designation and standard practices for Chartered Accountants working in the investigative and forensic accounting fields. Ms. MacMillan was familiar with the IFA Alliances' Standard Practices, including, in particular, section 700, which governs expert testimony. Section 700 provides, in part, that "[e]xpert witnesses have a duty to provide independent assistance to the Tribunal by way of objective unbiased testimony in relation to matters within their expertise"; "Tribunal" is defined to include "any trier of fact including, without limitation, a judge…"[43]

25. On cross-examination, Ms. MacMillan acknowledged that she was familiar with the rules and obligations governing the independence and objectivity of accountants and expert witnesses. In this regard, Ms. MacMillan testified in court that:

(a) the ICANS and the CICA Handbook impose duties of independence and objectivity on their members;

(b) independence is a key component of both audits and review engagements;

(c) "you always want to maintain your independence and objectivity"; and

(d) she owed an "ultimate duty to the court" in testifying as an expert witness.[44]

26. Ms. MacMillan also admitted that when she was retained in July 2009, she (i) was aware that some of her partners in the Kentville and Halifax offices had done prior, seemingly independent assessment type work on AWARD's audited financial statements, including preparing the 2005 Review Engagement and the 2004 Restated Financials, and (ii) knew she

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[42] Exhibit 1 to the MacMillan Cross-Examination, Tab 8: Excerpt from ICANS' Rules of Professional Conduct, ss. 202.2 and 204, Appellants' Record, Vol. IV, Tab IV-1-H, pp. 48-50

[43] Exhibit 1 to the MacMillan Cross-Examination, Tab 7: Excerpt from the CICA Handbook - 700. Expert Testimony, Appellants' Record, Vol. IV, Tab IV-1-G, p. 43 and 46 (footnote 1)

[44] MacMillan Cross-Examination at pp. 52, 59, 73-76 and 83-85, Appellants' Record, Vol. III, Tab III-E, pp. 55, 62, 76-79 and 86-88

was being retained by Mr. Fisher, a consultant in this litigation, for and on behalf of the AWARD Legal Fund, whom she described as the "plaintiffs in this litigation".[45]

27. Ms. MacMillan placed herself in an untenable position of conflict. While purporting to act as an expert witness who owed duties of independence to the Court, Ms. MacMillan has also acknowledged that at the same time she "absolutely" owed other duties to her partners at Grant Thornton, including a duty not to expose them to lawsuits or professional conduct complaints/liability – in other words, "to take whatever steps are reasonable to ensure that they don't get sued or don't get complaints of professional conduct against them…."[46] Yet Ms. MacMillan was unable to explain how she could conceivably maintain her "independence" as an expert witness yet remain loyal to her partners' and her firm's interests. Clearly, if she gave an expert opinion contrary to her partners' at Grant Thornton on the critical 2004 Restated Financials or the 2005 Review Engagement, she would expose them and, in turn, herself to a potential lawsuit or disciplinary complaint, as her expert opinion would undermine the validity of the Grant Thornton work on the key 2004-2005 financial statements and, also, potentially undermine the entire basis for this lawsuit. Ms. MacMillan could not satisfy the requirement of being independent given her position of conflict.

28. Indeed, as found by the Motions Judge, ***if Ms. MacMillan reached a contrary conclusion to her partners***, i.e. that the audits and audited financial statements as prepared by WBLI complied with GAAP and GAAS, ***she would have exposed them and herself to allegations of negligence, professional misconduct and potential liability*** with respect to the Respondents' reliance on Grant Thornton's work in formulating their negligence claim.[47]

29. In the circumstances, Ms. MacMillan was severely constrained from providing a contrary view to the one reached by her partners in preparing the 2005 Review Engagement and the 2004 Restated Financials. As determined by the Motions Judge:

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[45] MacMillan Cross-Examination at pp. 30-42 and 77-78, Appellants' Record, Vol. III, Tab III-E, pp. 33-45 and 80-81; see also, Exhibits 2 and 3 to the MacMillan Cross-Examination, Retainer letters dated July 2 and September 22, 2009, Appellants' Record, Vol. IV, Tabs IV-2 and IV-3

[46] MacMillan Cross-Examination at pp. 83-85, Appellants' Record, Vol. III, Tab III-E, pp. 86-88

[47] Decision of the Motions Judge at paras. 102 and 106, Appellants' Record, Vol. I, Tab I-B, pp. 47 and 49

> "[t]he moment that [Grant Thornton's prior work] is put to the court as evidence Ms. MacMillan will be in an apparent conflict of interest. It does not matter that she might have reached the same conclusion as her partners. It does not matter that the work was not done contemporaneously. ***What matters is that a reasonable observer would see that she is constrained from providing a contrary view. A contrary view would expose her partners, and therefore herself, to the prospect of liability, regardless of whether Kentville Grant Thornton had an ongoing retainer with the Respondents***."[48] (emphasis added)

30. Ms. MacMillan herself eventually recognized that she was in an irreconcilable conflict. Her acknowledgement of her irreconcilable conflict was cited by the Motions Judge and incorporated into His Honour's decision, wherein he quoted the following questions and answers from her cross examination:

> "Ms. MacMillan admitted, in response to a hypothetical question on cross-examination, that she would have had to reconsider her retainer if she had known that one of her partners would be testifying at trial. This response is captured in the following exchange:
>
> > ***Q: If someone told you that the Grant Thornton partners from the Kentville office were going to testify about the 2005 review engagement date in this case, and that evidence was going to form part of the negligence claim against WBLI, would that have precluded you from being a witness in this case?***
> >
> > A: One is I think… and again this is hypothetical right…
> >
> > Q: Yes.
> >
> > A: I would certainly have had to look at it in that context, which I didn't because that was not what I was asked to do.
> >
> > Q: Can you answer the hypothetical?
> >
> > A: You gotta look at all the … I gotta think about that because that was never a part of the… and so what I think about whether I could then be retained to be as [sic] an expert witness…
> >
> > Q: Yes.

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[48] Decision of the Motions Judge at para. 102, Appellants' Record, Vol. I, Tab I-B, p. 47

A: I think I would have a long hard thinking about that.

Q: And what conclusion would you come to?

A: Probably that no we wouldn't."[49] (emphasis added)

31. As stated by the Motions Judge, "[t]he problem Ms. MacMillan faces is that this is not a hypothetical example. The work of Kentville Grant Thornton forms part of the Respondents' statement of claim and case for negligence."[50] Having regard to these circumstances, the Motions Judge concluded that "this is one of those clearest of cases where the reliability of the expert is so impugned that their evidence does not meet the threshold requirements for admissibility" and "the motion to strike remedy is warranted."[51]

v. MacMillan's Work Product Was Not Independent

32. The Motions Judge's decision to strike the MacMillan Affidavit could have been made solely on the basic premise that Ms. MacMillan lacked the requisite independence of an expert witness. However, the evidence in this case goes further and actually establishes that Ms. MacMillan was, in fact, not independent in terms of the work she performed, that she did not arrive at her opinions independently of the previous Grant Thornton work for AWARD and, to a certain extent, that was prepared to simply "cut and paste" the work done at the Kentville office of Grant Thornton, rather than arriving at her conclusions independently and impartially.

33. In fact, Ms. MacMillan admitted on cross examination that she simply took some of the work done from the Special Procedures Report that was previously completed by her partners at Grant Thornton in Kentville and then adopted it as her own conclusions to support her purported opinion that WBLI were somehow negligent in the work they performed.[52] On this issue, the Motions Judge expressly held that, "[i]nterestly, Ms. MacMillan seems to have incorporated some of the work of the Kentville office of Grant Thornton as part of her

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[49] Decision of the Motions Judge at para. 101, Appellants' Record, Vol. I, Tab I-B, p. 46

[50] Decision of the Motions Judge at para. 102, Appellants' Record, Vol. I, Tab I-B, p. 47

[51] Decision of the Motions Judge at paras. 101 and 106, Appellants' Record, Vol. I, Tab I-B, pp. 46 and 49

[52] MacMillan Cross-Examination at pp. 170-171 and 173-179, Appellants' Record, Vol. III, Tab III-E, pp. 173-174 and 177-182

opinion".[53] This express finding of fact nullified any suggestion that Ms. MacMillan had tried to be independent in her work.[54]

vi. MacMillan's Work Was Incomplete

34. Furthermore, Ms. MacMillan was predisposed to side with the previous advice and opinions of her Kentville office partners, even without having all the necessary information at her disposal. She provided her opinion without a complete record and before reviewing all of the evidence that she herself considered to be necessary in order to give an opinion. Ms. MacMillan specifically requested (through counsel) copies of WBLI's working papers for the years 1990 to 1994. On cross-examination, she explained that AWARD adopted a significant change in accounting policy in that period of time and that access to the relevant working papers would be "valuable", "useful" and even "very critical" to her assessment of the GAAP issues.[55] Ms. MacMillan did not receive this information.[56] Ms. MacMillan's willingness to form conclusions in the absence of information that she and counsel for AWARD had previously characterized as "required" further undermines any suggestion that she was acting independently or was prepared to arrive at her conclusions independently.

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[53] Decision of the Motions Judge at para. 102, Appellants' Record, Vol. I, Tab I-B, p. 47

[54] The Respondents claim that WBLI failed to meet the standard of care of auditors by (among other things) improperly allocating supplier rebates to the outstanding accounts of former members as well as advertising expenses. The purported "independent" findings in the MacMillan Affidavit include findings that relate to both of these claims. In particular, Ms. MacMillan opined that (i) WBLI's reporting of certain supplier rebates (i.e., reporting them as a reduction of the outstanding accounts of former members) resulted in an understatement of revenue and net earnings of approximately $4 million; and (ii) WBLI's allocation of certain salaries and expenses (i.e., the allocation of them to advertising expenses, against which certain supplier rebates were then credited) resulted in an understatement of revenue and expenses of approximately $8 million. When asked about how she arrived at her conclusions on these issues, Ms. MacMillan admitted on cross-examination—and the Motions Judge found—that she simply took the information from the Special Procedures Report that was previously completed by her partners at Grant Thornton and adopted that information as her own conclusions. See: notes 52 and 53, above; MacMillan Affidavit at para. 76, Appellants' Record, Vol. II, Tab III-C, pp. 71-72; Amended Claim at paras. 10(f) and (g) (and paras. (b)-(e), which are also directly tied to the treatment of outstanding accounts of former members and the allocation of supplier rebates thereto), Appellants' Record, Vol. I, Tab II-C, pp. 160-162; Decision of the Motions Judge at para. 102, Appellants' Record, Vol. I, Tab I-B, p. 47

[55] See Exhibit 1 to the MacMillan Cross-Examination, Tab 18: Letter from S. MacMillan to M. Rabin dated June 8, 2010, Appellants' Record, Vol. IV, Tab IV-1-R; Exhibit 1 to the MacMillan Cross-Examination, Tab 14: Letter from B. Murphy to A. D'Silva dated January 8, 2010, Appellants' Record, Vol. IV, Tab IV-1-N; MacMillan Cross-Examination at pp. 190-191, Appellants' Record, Vol. III, Tab III-E, pp. 193-194

[56] See Exhibit 58 to the Affidavit of Myer Rabin sworn April 23, 2010, Letter from Alan D'Silva to B. Murphy dated February 1, 2010, Appellants' Record, Vol. II, Tab III-A-1 (objecting to the relevance of the materials requested)

D. THE DECISIONS BELOW

i. The Motions Judge's Decision

35. On June 1, 2012, the Motions Judge issued his decision striking out the MacMillan Affidavit as inadmissible. He noted the central importance of the judge's gatekeeper role,[57] and held that the law in Nova Scotia is that an expert's report must be, and be seen to be, independent and impartial.[58] The Motions Judge concluded that Ms. MacMillan's opinion was not independent and that the reliability of Ms. MacMillan was so impugned that her evidence did not meet the threshold requirements for admissibility.[59] In particular, the Motions Judge found that Ms. MacMillan was in a conflict of interest in which she could not take an opposing view to one party's advocate without exposing her partners and herself to potential liability.[60] In light of these considerations, His Honour was satisfied that this was "one of those clearest cases where the motion to strike remedy is warranted."[61]

36. In deciding to exclude Ms. MacMillan's evidence, the Motions Judge relied on the Nova Scotia Court of Appeal decision in *Morriscey v. Zwicker*, where the Court of Appeal emphasized the importance of the judge as a gatekeeper for admitting expert evidence, stating: "The judge stands as the gatekeeper to determine all issues of admissibility. Nowhere is that more important - or difficult - than when considering the evidence of experts."[62]

37. The Motions Judge further held, after citing a series of Nova Scotia court decisions, that "in Nova Scotia an expert's report must be, and be seen to be, independent and impartial".[63]

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[57] Decision of the Motions Judge at para. 83, Appellants' Record, Vol. I, Tab I-B, p. 40

[58] Decision of the Motions Judge at para. 99, Appellants' Record, Vol. I, Tab I-B, pp. 45-46

[59] Decision of the Motions Judge at para. 101, Appellants' Record, Vol. I, Tab I-B, p. 46

[60] Decision of the Motions Judge at paras. 102-106, Appellants' Record, Vol. I, Tab I-B, pp. 47-49

[61] Decision of the Motions Judge at paras. 101 and 106, Appellants' Record, Vol. I, Tab I-B, pp. 46 and 49

[62] *Morriscey v. Zwicker*, 2001 NSCA 56 at para. 29, Appellants' Book of Authorities [BOA], Vol. I, Tab Q, cited in the Decision of the Motions Judge at para. 83, Appellants' Record, Vol. I, Tab I-B, p. 40

[63] Decision of the Motions Judge at para. 99, Appellants' Record, Vol. I, Tab I-B, pp. 45-46, citing, among other cases, *Lunenburg Industrial Foundry and Engineering Ltd v. Commercial Union Assurance Co of Canada*, 2005 NSSC 62 at para. 32, BOA, Vol. I, Tab O, and *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315 at para. 22, BOA, Vol. I, Tab T

ii. The Court of Appeal's Decision

38. On May 24, 2013, the Nova Scotia Court of Appeal granted the appeal of the Motions Judge's Order. Chief Justice Macdonald would have upheld the Motions Judge's decision in its entirety. In dissenting reasons, the Chief Justice reviewed the applicable authorities and held that the Motions Judge had correctly identified the need for independence and impartiality; and had correctly acknowledged that his role as a "gatekeeper" mandated that he exclude expert evidence from the outset when appropriate.[64]

39. The majority of the Court of Appeal, however, reversed the Motions Judge's decision and found that there is no requirement that a party must demonstrate that its expert witness is, or appears to be, independent.[65] The majority emphasized that it was "the so-called ***appearance*** of a lack of independence that caused the motions judge to rule [Ms. MacMillan's] evidence inadmissible" (emphasis in original).[66] The majority of the Court of Appeal held that, in these circumstances, an expert's evidence that is otherwise admissible cannot be excluded on the basis of a lack of independence.[67] This conclusion from the majority's judgment means that even in the face of an irreconcilable conflict of interest and lack of requisite independence, a motions judge or trial judge must admit the evidence in any event.

PART II - QUESTION IN ISSUE

40. The main finding of the majority of the Court of Appeal described above was, with respect, in error. That error becomes the question in issue on this appeal: whether Canadian courts should, in the exercise of their gatekeeper function, exclude a proposed expert who clearly lacks the requisite independence to qualify as an expert.

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[64] Court of Appeal Reasons at paras. 38-39 and 43, Appellants' Record, Vol. I, Tab I-D ("In summary, the judge properly articulated the relevant legal principles surrounding the admission of expert evidence.")

[65] Court of Appeal Reasons at para. 161, Appellants' Record, Vol. I, Tab I-D, p. 102

[66] Court of Appeal Reasons at para. 122, Appellants' Record, Vol. I, Tab I-D, p. 94

[67] Court of Appeal Reasons at paras. 159-161, Appellants' Record, Vol. I, Tab I-D, p. 102

PART III - STATEMENT OF ARGUMENT

A. INDEPENDENCE IS A PREREQUISITE OF A PROPERLY QUALIFIED EXPERT

41. Canadian courts have applied a long-standing requirement that in order to testify, experts must be neutral, objective and possess the requisite independence. More recently, Canadian courts have repeatedly adopted the following fundamental principles governing the duties and responsibilities of experts as set out in the leading English case of *The Ikarian Reefer*:[68]

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of the litigation; and
- An expert should provide independent assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume the role of advocate.

42. In *R. v. Mohan,* this Honourable Court set out the four part test for the admission of expert evidence, namely: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rules; and (d) a properly qualified expert.[69]

43. While this Honourable Court in *Mohan* was not required to expressly articulate independence as one of the four general criteria for the admission of expert evidence, some courts have included the independence requirement as an integral component of the *Mohan*

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[68] *National Justice Compania Naviera SA v. Prudential Assurance Co.*, (sub nom. "*Ikarian Reefer*"*(The)*) [1993] 2 Lloyd's Rep. 68 at 81-82 QB (Comm. Ct.) (Eng.), BOA, Vol. I, Tab S [*The Ikarian Reefer*]; see also, *R. v. Harris and others*, [2005] EWCA Crim 1980 at para. 271, BOA, Vol. I, Tab Z. Many Canadian courts have applied these principles in the course of determining whether to admit expert evidence. See, for example, *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297, lv. to app. to the S.C.C. ref'd [2012] S.C.C.A. No. 309 at paras. 107-109, BOA, Vol. I, Tab E. See also, *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 388 at para. 85, lv. to app. to the S.C.C. ref'd [2009] S.C.C.A. No. 303, BOA, Vol. II, Tab EE; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 at paras. 5-7 (SCJ), BOA, Vol. I, Tab C; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 at 3 (Gen. Div.), var'd [2000] O.J. No. 3309 (CA), BOA, Vol. I, Tab I; *Es-Sayyid v. Canada (Minister of Public Safety and Emergency preparedness)*, 2012 FCA 59 at para. 43, lv. to app. to the S.C.C. ref'd [2012] S.C.C.A. No. 116, BOA, Vol. I, Tab H; *United City Properties Ltd. v. Tong*, 2010 BCSC 111 at paras. 41-44, BOA, Vol. II, Tab FF; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617 at paras. 36 and 38, BOA, Vol. I, Tab N; *Lunenburg Industrial Foundry and Engineering, supra* at para. 32, BOA, Vol. I, Tab O

[69] *R. v. Mohan*, [1994] 2 SCR 9 at para. 17, BOA, Vol. II, Tab CC

test, encompassed by the "properly qualified expert" criterion.[70] In other cases, such as the within case, courts frame the independence requirement as a component of the necessity or the reliability assessments under *Mohan*,[71] or as a factor to be considered in the exercise of the judge's discretion to exclude evidence where the probative value of the evidence is negated by independence concerns.[72] In yet other cases, the courts simply act on the understanding that the "rules permitting the introduction of opinion testimony are clearly predicated on impartiality", and in a clear case raising independence concerns, independence should be treated as a preclusionary requirement.[73]

44. In ***all*** of these cases, in different Canadian jurisdictions, independence is treated by the court as being integral to the expert's role. In the Nova Scotia case of *Lunenburg v. Commercial Union Assurance Co.*, the Nova Scotia Supreme Court held that "[a]n important qualification to receiving opinions from experts is that they demonstrate ***independence and objectivity*** in tendering and forming their opinions" (emphasis added), citing *The Ikarian Reefer*.[74] In *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.,* the British Columbia Supreme Court excluded the expert evidence of a director and shareholder of the plaintiff, citing his "***obvious and real conflict of interest***" (emphasis added).[75] In *Bank of Montreal v. Citak,* the Ontario Superior Court of Justice excluded the evidence of an expert who was being paid, in part, on a contingency fee basis, finding that "***experts must be neutral***

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[70] See *Bank of Montreal v. Citak, supra* at para. 5, BOA, Vol. I, Tab C; subsequent cases applying this holding include *Dean Construction Co. v. M.J. Dixon Construction Ltd*., 2011 ONSC 4629 at paras. 58-59, BOA, Vol. I, Tab G (concerning a contingency arrangement between party and expert), and *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166 at para. 69, rev'd on other grounds 2011 ONCA 460, BOA, Vol. I, Tab B. In *R. v. Demetrius*, [2009] O.J. No. 1868 at para. 9 (SCJ), BOA, Vol. I, Tab X, the court treated the qualification criterion under the *Mohan* test as including the requirement that an expert be "properly independent and impartial"

[71] See e.g. *R. v. Docherty*, 2010 ONSC 3628 at para. 10, BOA, Vol. I, Tab Y ("Whether the impartiality requirement for expert testimony is better addressed in a discussion of the reliability or necessity criteria or as an aspect of the trial judge's residual discretion to exclude evidence, in a case such as this, where on the face of it the relationship of the expert to the case causes a blatant concern, in my view it is properly dealt with as a preclusionary factor…")

[72] See e.g., *Alfano v. Piersanti*, *supra* at para. 111, BOA, Vol. I, Tab E ("[T]he court retains a residual discretion to exclude the evidence of a proposed witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it minimal or of no assistance. … If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has discretion to exclude the evidence.")

[73] See, e.g., *R. v. Docherty*, *supra* at paras. 10-11, BOA, Vol. I, Tab Y. See also, e.g., *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011 at paras. 3-4, BOA, Vol. I, Tab M; *Casurina Ltd. Partnership v. Rio Algom Ltd.*, [2002] O.J. No. 3229 (SCJ) at para. 243, aff'd [2004] O.J. No. 177 (CA), BOA, Vol. I, Tab F; and *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52 at paras. 24-25, BOA, Vol. I, Tab U

[74] *Lunenburg Industrial Foundry and Engineering, supra* at para. 32, BOA, Vol. I, Tab O

[75] *International Hi-Tech Industries, supra* at para. 4, BOA, Vol. I, Tab M

and objective [and], to the extent they are not, they are not properly qualified to give expert opinions" (emphasis added).[76] Similarly, in *Royal Trust Corporation of Canada et al. v. Fisherman*, the Ontario Superior Court of Justice excluded expert evidence from the defendant's U.S. lawyer, because "[t]he essence of expert evidence is that it is ***independent of any conflicting interest*** through connections with any of the parties" (emphasis added).[77] In *Casurina Ltd. Partnership v. Rio Algom Ltd.*, the Ontario Superior Court of Justice excluded expert evidence from members of organizations with a direct interest in the case, because they lacked "***the requisite independence***", and "cannot be considered ***adequately independent***" (emphasis added).[78]

45. Subsequent to *Mohan*, in *R. v. J.-L.J.*, this Honourable Court emphasized the important gatekeeping function of the trial judge and stated that "[t]he admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility."[79] In *R. v. D.D.*, while not dealing with independence concerns on the facts of that case, this Honourable Court did note the concern that a "lack of independence and impartiality can contribute to miscarriages of justice".[80]

46. The leading academic authorities in Canada are consistent with this view. For example, the authors of *McWilliams' Canadian Criminal Evidence* consider the need for expert independence alongside related concerns about lack of bias and impartiality, saying that they give rise together to an "impartiality requirement" or "impartiality qualification".[81] Under the *Mohan* test, they say that an "impartiality qualification" could be subsumed into a discussion of the reliability or necessity criteria, or as an aspect of the trial judge's residual discretion to

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[76] *Bank of Montreal v. Citak*, *supra* at para. 5, BOA, Vol. I, Tab C

[77] *Royal Trust Corporation of Canada et al. v. Fisherman* (2000), 49 OR (3d) 187, especially at para. 22, (SCJ), BOA, Vol. II, Tab DD

[78] *Casurina v. Rio Algom*, *supra* at para. 243, BOA, Vol. I, Tab F; see also *Prairie Well Servicing*, *supra* at paras. 24-25, BOA, Vol. I, Tab U

[79] *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 SCR 600 at para. 28, BOA, Vol. II, Tab AA

[80] *R. v. D.D.*, 2000 SCC 43, [2000] 2 SCR 275 at para. 52, BOA, Vol. I, Tab W

[81] Hill J., et al., eds., *McWilliams' Canadian Criminal Evidence*, 5th ed., loose-leaf (Toronto: Canada Law Book, 2013) at 12-73 and -74, BOA, Vol. II, Tab GG [*McWillams*]

exclude expert evidence where its costs outweigh its benefits;[82] but, "***elevation of the requirement*** to qualification status and in turn ***recognition as a preclusionary factor*** is equally justifiable and ***long overdue***" (emphasis added).[83] The authors of *McWilliams* state that expertise and independence go "hand in hand".[84]

47. Similar concerns are reflected in the conclusions of independent reviews of the role of experts in the justice system. For example, in the 2007 report of the Ontario Civil Justice Reform Project (the "**Osborne Report**"), the Honourable Coulter Osborne canvassed the issue of expert bias generally and his findings are particularly germane to the issue of independence.[85] He recommended (among other things) that the Ontario *Rules of Civil Procedure* (the "**Ontario *Rules***") be amended to expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them.[86]

48. The Honourable Mr. Osborne concluded that "[a]n express duty would reinforce existing professional obligations and ensure that this duty is consistently applied to all professions that provide expert evidence."[87] As a result of the Osborne Report, the Ontario *Rules* were amended to expressly state that it is the duty of every expert before the court to provide opinion evidence that is fair, objective and non-partisan; and that an expert's report

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[82] *McWilliams, supra* at 12-73 and -74, BOA, Vol. II, Tab GG ("Whether a witness should be afforded the testimonial privilege of expressing an expert opinion includes a broader notion of whether the witness is suited to do so based on impartiality, independence and a lack of bias. These factors can affect *reliability* every bit as much as expertise perequisites." [emphasis in original])

[83] *McWillams, supra* at 12-73 and -74, BOA, Vol. II, Tab GG

[84] *McWillams, supra* at 12-75, BOA, Vol. II, Tab GG

[85] The Hon. Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations*, November 2007 at 68-84, BOA, Vol. II, Tab HH [Osborne Report]. For a complete copy of this report, see online: Ministry of the Attorney General of Ontario, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>. See also, Rt. Honourable Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Department of Constitutional Affairs, UK: July 1996) at c. 13 and recommendations 156-173, BOA, Vol. II, Tab KK. For a complete copy of this report, see online: UK National Archives (Department of Constitutional Affairs), <http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/civil/final/contents.htm>. These materials highlight the problem of the "hired gun" expert leading to the so-called "battle of the experts". Proposals have been considered to require parties to retain a single expert, for the experts to meet and narrow the issues in dispute, and to ensure that experts understand their overriding duty is to the court rather than to their clients. Affirming the independence of experts is at the root of all of these proposals.

[86] Osborne Report, *supra* at 75-76 and 83, BOA, Vol. II, Tab HH

[87] Osborne Report, *supra* at 76, BOA, Vol. II, Tab HH

must include the expert's acknowledgment of his or her duties in this regard.[88] The applicable Nova Scotia rules on experts also clearly require independence and impartiality, as follows:

> 55.01 (1) This Rule provides procedure about expert opinion, and it does each of the following:
>
> […]
>
> (c) requires experts to make written representations to the court about the independence of the expert and the expert's participation in the proceeding;
>
> […]
>
> 55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
>
> (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court….[89]

49. The Honourable Stephen Goudge, then of the Ontario Court of Appeal, reached a similar conclusion in the criminal context, in his *Inquiry into Pediatric Forensic Pathology in Ontario*, citing the fundamental duty of experts "to give impartial expert testimony ***to assist the court***", and their "***duty to the court*** to provide impartial and candid evidence" (emphasis added).[90] He recommended the creation of a code of practice and performance standards for forensic pathologists in Ontario that would encompass this duty, as well as a general code of conduct for *all* experts testifying in criminal cases, "like the one advanced by Mr. Osborne for

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[88] Ontario *Rules*, *supra*, rr 4.1 and 53.03. All together, seven provinces have adopted requirements for experts along similar lines. See note 9, above.

[89] *Nova Scotia Civil Procedure Rules*, *supra*, rr 55.01 and 55.04

[90] Stephen J. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General: 2008) at 503 [Goudge Inquiry], BOA, Vol. II, Tab JJ. For a complete copy of this report, see online: Ministry of the Attorney General of Ontario, <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html>. At 503-504, the Hon. Goudge expressly adverts to the *Ikarian Reefer* factors in his discussion of the expert's duty to the court (citing *R. v. Harris and others*, *supra* at para. 271, BOA, Vol. I, Tab Z).

experts in civil proceedings", and indeed like similar codes of conduct and guidelines promulgated in England and Wales.[91]

50. In summary, the Motions Judge's approach in this case is consistent with the broad line of authorities that an expert witness must provide independent assistance to the Court by way of an objective, unbiased opinion on matters within his or her expertise. The expert's overarching duty is to the Court and not the litigants. Experts should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client.[92]

51. Indeed, in similar cases, Canadian courts have acted decisively to exclude the kind of evidence that was proposed to be admitted in this case. For example, the facts of *Fellowes, McNeil v. Kansa General Insurance Co.,*[93] a decision of the Ontario Court of Justice (General Division), are closely aligned with those in this appeal. In that case, the defendant insurance company ("**Kansa**") was dissatisfied with the conduct of its solicitors, Fellowes, McNeil ("**FN**"), with respect to the carriage of an insurance claim. Kansa replaced FN with a new solicitor, Mr. McInnis. Kansa also instructed Mr. McInnis to investigate a possible solicitor's negligence claim against FN. Kansa eventually sued FN and proposed Mr. McInnis as its expert on the issue of whether FN's conduct fell below the standard of care. The Court, referring to the principles set out in *The Ikarian Reefer,* refused to admit Mr. McInnis's evidence because he was not independent of Kansa:

> ***An expert must have a minimum requirement of independence***. I agree with [counsel for the plaintiff] that the role of Mr. McInnis is, in a sense, unprecedented. He is involved in the defence of [the insurance claim] (on behalf of Kansa) and he has been proposed as an expert on matters pertaining to the standard by which [FN] will be ultimately judged as to whether or not they performed in a manner consistent with that of reasonably competent solicitors handling complex insurance matters. By reason of the roles assumed by him, I find that Mr. McInnis cannot be such an expert.[94] (emphasis added)

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[91] Goudge Inquiry, *supra* at 504-505, BOA, Vol. II, Tab JJ

[92] *Frazer v. Haukioja,* [2008] O.J. No. 3277 at paras. 138-141 (SCJ), aff'd 2010 ONCA 249, BOA, Vol. I, Tab J; see also *Alfano v. Piersanti, supra* at para. 108, BOA, Vol. I, Tab E

[93] *Fellowes, McNeil, supra* BOA, Vol. I, Tab I

[94] *Fellowes, McNeil, supra* at 3, BOA, Tab I. Similarly, the British Columbia Supreme Court refused to admit the evidence of two proposed experts who lacked the requisite independence from one of the parties in the action in *Hutchingame v. Johnstone*, 2006 BCSC 271, especially at para. 8, BOA, Vol. I, Tab L. The parties were involved in a dispute regarding the

52. More recently, in *Carmen Alfano Family Trust (Trustee of) v. Piersanti*,[95] the Ontario Court of Appeal confirmed that expert evidence proffered by an individual who lacks independence and objectivity is inadmissible. The trial judge refused to admit the evidence of the appellants' expert witness as she found that the expert had based his analysis on the theories advanced by the appellants and had thereby assumed the role of advocate. The Ontario Court of Appeal upheld the trial judge's ruling, and adopted the view that "experts must be neutral and objective [and] to the extent they are not, they are not properly qualified to give expert opinions."[96] Referring to its decision in *R. v. Abbey*,[97] the Court of Appeal held:

> [T]he court retains a residual discretion to exclude the evidence of a proposed witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it minimal or of no assistance. … If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has discretion to exclude the evidence.[98]

53. In contrast to these authorities, the majority of the Nova Scotia Court of Appeal started with the proposition that "[p]artial witnesses testify in courts every day" (indeed, "partial witnesses are the bread and butter for triers of fact"),[99] thereby conflating the distinction between fact witnesses, who may be partial, and opinion witnesses, who are required to be the opposite.

54. The majority of the Nova Scotia Court of Appeal distinguished on their facts the applicable cases that the Motions Judge considered, going so far as to stress that the "case of *The Ikarian Reefer* had nothing to do with the admissibility of expert opinion evidence" – on

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purchase and sale of real property and one of the issues in dispute was the failure of the plaintiff or the defendant to obtain the Crown's consent to the assignment of a lease. The Appellants tendered the expert opinions of their own solicitors in support of their position that obtaining the consent was the plaintiff's obligation. The plaintiff sought to strike the evidence because the first expert (McGregor) acted for the Appellants and the second expert (Nowosad) employed McGregor. The Respondents argued that McGregor would be giving evidence at the trial; Nowosad and McGregor were members of the same firm; and if the Court found that McGregor was wrong then he might himself be found negligent. The Court accepted these arguments, emphasizing the possibility of both of the experts' ultimate liability for negligence and determined that their evidence should not be admitted.

[95] *Alfano v. Piersanti, supra*, BOA, Vol. I, Tab E

[96] *Alfano v. Piersanti, supra* at para. 107, BOA, Vol. I, Tab E

[97] See *R. v. Abbey*, 2009 ONCA 624 at paras. 87 and 91, lv. to app. to the S.C.C. ref'd, [2010] S.C.C.A. No. 125, BOA, Vol. I, Tab V

[98] *Alfano v. Piersanti, supra* at para. 111, BOA, Vol. I, Tab E

[99] Court of Appeal Reasons at para. 57, Appellants' Record, Vol. I, Tab I-D, p. 78

its facts.[100] The Court of Appeal further said that the general observations in *The Ikarian Reefer* about an expert's duties that are frequently cited as axiomatic of the expert's role "are merely that – general observations".[101] Against all of this clear authority, the majority of the Nova Scotia Court of Appeal stated that (i) "there is no standalone requirement for a party to demonstrate that its expert witness is, or appears to be, independent", and (ii) there is no "residual discretion" to exclude expert evidence "on account of perceived bias" and the "mere appearance or even existence of a conflict due to personal, professional or institutional relationship does not disqualify" a proposed expert.[102] The majority of the Court of Appeal did not address the nature of the conflict of interest that is at the heart of this appeal. Instead, the majority held that the case turns on the Motions Judge's conclusion that an expert must be seen to be independent, which they said has no foundation in "principle or authority".[103]

55. Contrary to the Nova Scotia Court of Appeal's decision, considering whether an expert is independent has repeatedly been determined to be central to a judge's gatekeeping function and Canadian courts have repeatedly excluded experts who do not meet this test. Indeed, Canadian courts have excluded the evidence of experts who lack independence at various stages of civil litigation proceedings, including motions[104] and trials.[105] In a pair of recent certification decisions under the Ontario *Class Proceedings Act, 1992* and the misrepresentation provisions of the Ontario *Securities Act,*[106] the Ontario Superior Court of Justice has affirmed that expert evidence can be disposed of at that very preliminary stage of proceedings as well.[107]

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[100] Court of Appeal Reasons at para. 90, Appellants' Record, Vol. I, Tab I-D, p. 85

[101] Court of Appeal Reasons at para. 88, Appellants' Record, Vol. I, Tab I-D, p. 84

[102] Court of Appeal Reasons at paras. 161 and 125, Appellants' Record, Vol. I, Tab I-D, pp. 102 and 94

[103] Court of Appeal Reasons at paras. 89 and 96, Appellants' Record, Vol. I, Tab I-D, pp. 85 and 86-87

[104] *Royal Trust v. Fisherman, supra* at para. 22, BOA, Vol. II, Tab DD

[105] *Bank of Montreal v. Citak, supra* at paras. 5-7, BOA, Vol. I, Tab C

[106] *Class Proceedings Act, 1992*, S.O., c. 6; *Securities Act*, R.S.O. 1990, c. S.5

[107] See *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp*., 2013 ONSC 6864 at paras 178-193, BOA, Vol. I, Tab R; *Gould v Western Coal*, 2012 ONSC 5184 at paras 81-95, BOA, Vol. I, Tab K. For example in *Gould v. Western Coal*, at para. 95, the Honourable Justice Strathy concluded that he had "no confidence that [the plaintiff's expert] evidence can be relied upon, or could possibly be relied upon at trial", citing his apparent lack of independence and other concerns.

56. Despite these clear authorities, including other authorities from Nova Scotia which have excluded expert evidence,[108] the majority of the Nova Scotia Court of Appeal held that "[t]here is no stand-alone requirement for a party to demonstrate that its expert witness is, or appears to be[,] independent."[109]

B. PUBLIC POLICY CONSEQUENCES OF ABANDONING THE INDEPENDENCE RULE

57. Expert evidence that is not, or not seen to be, independent and impartial undermines the integrity of the justice system and the public's confidence in that system. Ms. MacMillan lacked the requisite independence of an expert in the circumstances and could never be seen to be impartial by virtue of her irreconcilable conflict.

58. If the Nova Scotia Court of Appeal's decision stands, then the basic criteria for the admissibility of expert evidence, as set out in this Honourable Court's decision in *R. v. Mohan*,[110] and applied subsequently in hundreds of cases, could be applied inconsistently across the country with experts who lack independence, or the appearance of independence, being allowed to give evidence in some provinces and not others. Unless the rule of expert independence is affirmed, then judges across Canada will be faced with the intractable problem of evaluating the evidence of experts who owe competing legal duties to others versus the court. This would be an unacceptable result for the administration of justice in Canadian courts and the fair adjudication of litigation disputes.

59. Indeed, the Nova Scotia Court of Appeal's decision has recently been cited for the incorrect proposition that an expert need not be independent. In *Malton v. Attia*,[111] a case alleging lawyer's negligence, the Alberta Court of Queen's Bench cited all of the "characteristics and duties of an expert witness" from the *The Ikarian Reefer* – but concluded, based on the Court of Appeal's decision in this case, that "Canadian jurisprudence varies in one significant sense from the *Ikarian Reefer* criteria, that 'independence' is not a strict

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[108] See *Lunenburg Industrial Foundry and Engineering, supra* at para. 32, BOA, Vol. I, Tab O, and *Ocean v. Economical Mutual Insurance, supra* at para. 22, BOA, Vol. I, Tab T

[109] Court of Appeal Reasons at para. 161, Appellants' Record, Vol. I, Tab I-D, p. 102

[110] *R. v. Mohan*, *supra* at paras. 17-28, BOA, Vol. II, Tab CC

[111] *Malton v. Attia*, 2013 ABQB 642, BOA, Vol. I, Tab P

criterion for an expert to be accepted by the court. Rather an expert witness need not be independent, but must be impartial. A lack of independence may influence the weight of the expert opinion."[112]

60. The statement that "'independence' is not a strict criterion for an expert to be accepted by the court" in Canada is clearly untenable and gives rise to a number of public policy concerns. First, the approach taken by the Nova Scotia Court of Appeal in this case undermines public confidence in the integrity of the justice system because it allows for the admission into evidence of expert evidence that may not be, or be seen to be, independent and impartial. This Honourable Court has firmly established the central role of the trial judge as "gatekeeper" in relation to expert evidence. Despite the fact that the Motions Judge in this case was satisfied that this was "one of those clearest cases where the motion to strike remedy is warranted", the majority of the Nova Scotia Court of Appeal determined that the Motions Judge erred in exercising his gatekeeper role.

61. Second, abandoning the rule that experts should be, and appear to be, independent will erode the distinction between fact and expert witnesses, with serious repercussions for triers of fact. The blurring of these lines is evident in the reasons of the Court of Appeal in this case, wherein the majority commented, as a starting point for its analysis, that "[p]artial witnesses testify in courts every day. If impartiality and independence were necessary attributes for a witness, there would be no litigation".[113]

62. Third, if the Court of Appeal's decision stands, the potential chaotic and undesirable results are self-evident. If experts cannot be excluded at an interlocutory stage of a proceeding on the basis of fundamental concerns about independence, the courts will be forced to hear and weigh evidence from so-called "experts" who are biased, have a vested interest in the outcome, who cannot satisfy the impartiality requirement, and who have clear and unavoidable conflicts of interest. For example, a lawyer could testify at length about whether his or her partners had met the standard of care in giving legal advice, ***notwithstanding*** that he or she would share liability with that party if the court decided that the partner was negligent.

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[112] *Malton v. Attia*, *supra* at para. 28, BOA, Vol. I, Tab P

[113] Court of Appeal Reasons at para. 57, Appellants' Record, Vol. I, Tab I-D, p. 78

Such an "expert's evidence" would (and should) be given zero weight. Justice Binnie has underscored the dangers of waiting until the end of the trial to determine the weight of compromised evidence that should properly be dealt with at the outset. His focus in this discussion is scientific evidence (and "even rather crude scientific evidence"):

> Institutionally, judges hesitate to exclude such evidence in a jury case for fear of usurping the fact-finding function of the jury. Procedurally, in a judge-alone case, there is always a temptation to let the evidence in, fully understood or not, and for the judge to leave it to the end of the trial to determine what weight, if any, it is to be given. Either way, the result can be an enormous waste of time and money and, in some cases, a miscarriage of justice.[114]

63. Likewise, when an expert's position is manifestly untenable and undermines the very concept of being an expert, it is a complete waste of the court's time and resources to consider it. It is a better use of judicial resources to exclude such "experts" from the outset.

64. These concerns have also been expressed by courts hearing jury trials. In in *R. v. K. (L.),*[115] the Ontario Superior Court of Justice excluded the expert evidence of a doctor who was in an on-going therapeutic/counselling relationship with the complainant in a prosecution for child abuse. The court was respectful of the doctor's role but explicit in describing the intractable difficulties of dealing with this kind of lack of independence as a matter of weight:

> In this case, I have no doubt that cross-examination would easily uncover any lack of impartiality on the part of the witness. This is how this issue really came to light during the *voir dire*. But this is precisely the problem. ***The lack of independence*** in this case tends to reinforce the veracity of the complainant's evidence and thereby ***insinuates the validity of the allegations*** against Ms. K. This reinforcement carries ***real danger in a jury trial*** because of the aura of prestige, expertise and authority that often accompanies expert opinion evidence. Uncovering this bias in front of the jury is precisely what [the lawyer for the accused] wishes to avoid. Indeed, she is concerned that this might happen in any event, despite everyone's best efforts to prevent it from occurring.
>
> More broadly, [the lawyer for the accused] submits ***that counsel and the Court should not be required to bend over backwards by making adjustments and***

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[114] Ian Binnie, "Science in the Courtroom: The Mouse that Roared" (Autumn 2008) 27 Advocates' Soc. J. No. 2 at 320, BOA, Vol. II, Tab II

[115] *R. v. L.K.*, 2011 ONSC 2562, BOA, Vol. II, Tab BB

> ***allowances in an attempt to address the problems*** that are presented by the Crown's decision to tender the complainant's therapist as its proposed expert. I agree. Moreover, and as I have said, I am not confident that these proposed measures would be efficacious.
>
> Consequently, I am not prepared to qualify [the doctor] as an expert witness in this case. In reaching this conclusion, I in no way wish to be taken as demeaning [the doctor's] formal qualifications, her competence or her professional integrity. And, of course, my comments and conclusions in this ruling ought to have no influence on whether she should be permitted to give expert opinion evidence in the future. But for the reasons stated above, in the circumstances of this case, some of the things that no doubt make [the doctor] an accomplished psychotherapist disqualify her from giving detached and impartial expert opinion evidence.[116] (emphasis added)

65. Additionally, in situations where a judge may be precluded or restricted from ***weighing*** evidence, as on a summary judgment motion in Nova Scotia,[117] if experts who are not independent are allowed in the proceedings, then litigants face the possibility that cases without merit could survive a defence summary judgment motion, solely by putting the evidence of an improper "purported expert"' into the record as a strategic device to "throw a wrench" into the fair adjudication of the dispute. In the circumstances of this case, the Motions Judge correctly identified that the "ramification of not allowing a motions judge to strike such evidence, in the clearest of cases, is that the court will lose the benefit of the summary judgment process."[118]

66. Finally, any policy reasons against an exclusionary rule are not sufficiently compelling and indeed they contradict the very rationale for allowing experts to give opinion evidence. For example, in *1159465 Alberta Ltd. v. Adwood Manufacturing Ltd.*,[119] the Alberta Court of Queen's Bench expressed skepticism about such an exclusionary rule, because of the importance of expert evidence to the court, the limited pool of "highly specialized experts with true independence", the reality that "many experts … have become notionally heavily aligned with either the defense or the plaintiff's bar", and the efficacy of cross-examination to

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[116] *R. v. L.K.*, *supra* at paras. 19-21, BOA, Vol. II, Tab BB

[117] See *Burton Canada Co. v. Coady*, 2013 NSCA 95 at paras. 87(10) and (11), BOA, Vol. I, Tab D

[118] Decision of the Motions Judge at para. 98, Appellants' Record, Vol. I, Tab I-B, p. 45

[119] *1159465 Alberta Ltd. v. Adwood Manufacturing Ltd.*, 2010 ABQB 133, aff'd 2011 ABCA 259 at Sched. 2, paras. 2.17-2.31, BOA, Vol. I, Tab A

test expert opinion. However, the importance of expert evidence with the requisite independence and impartiality, and the risk of the polarization of purported "hired gun" expert testimony, are precisely the reasons why experts who lack the requisite independence should be excluded from testifying.

67. Notwithstanding any broad policy rules that might be laid down by this Honourable Court concerning the requisite independence of expert witnesses and the court's gatekeeping function, it is respectfully submitted that the proposed expert in this case was properly excluded. As the Motions Judge found, this was "one of those clearest of cases where the reliability of the expert is so impugned that their evidence does not meet the threshold requirements for admissibility".[120] Notwithstanding any broad policy statements requiring the exclusion of non-independent evidence in all cases, there must be a residual discretion to exclude expert evidence on the independence question and the Motions Judge properly exercised his discretion in this case. There were no grounds for the Nova Scotia Court of Appeal to interfere with that discretionary decision.

PART IV - SUBMISSIONS AS TO COSTS

68. In accordance with the usual rule, costs should follow the event.

PART V - ORDER SOUGHT

69. The Appellants respectfully seek an Order granting the appeal and reaffirming the order of the Honourable Justice Arthur W.D. Pickup dated September 4, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: at Toronto, Ontario on
March 28, 2014

Counsel for the Appellants:

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STIKEMAN ELLIOTT LLP

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[120] Decision of the Motions Judge at paras. 102-106, Appellants' Record, Vol. I, Tab I-B, pp. 47-49

PART VI - TABLE OF AUTHORITIES

BOA Tab	Cases	Paragraph References
A.	*1159465 Alberta Ltd. v. Adwood Manufacturing Ltd.*, 2010 ABQB 133, aff'd 2011 ABCA 259	66
B.	*Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166, rev'd on other grounds 2011 ONCA 460	43
C.	*Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (SCJ)	41, 43, 44, 55
D.	*Burton Canada Co. v. Coady*, 2013 NSCA 95	65
E.	*Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297, lv. to app. to the S.C.C. ref'd [2012] S.C.C.A. No. 309	41, 43, 50, 52
F.	*Casurina Ltd. Partnership v. Rio Algom Ltd.*, [2002] O.J. No. 3229 (SCJ), aff'd [2004] O.J. No. 177 (CA)	43, 44
G.	*Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629	43
H.	*Es-Sayyid v. Canada (Minister of Public Safety and Emergency preparedness*), 2012 FCA 59, lv. to app. to the S.C.C. ref'd [2012] S.C.C.A. No. 116	41
I.	*Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.), var'd [2000] O.J. No. 3309 (CA)	41, 51
J.	*Frazer v. Haukioja*, [2008] O.J. No. 3277 (SCJ), aff'd 2010 ONCA 249	50
K.	*Gould v. Western Coal*, 2012 ONSC 5184	55
L.	*Hutchingame v. Johnstone*, 2006 BCSC 271	51
M.	*International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011	43, 44
N.	*Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617	41
O.	*Lunenburg Industrial Foundry and Engineering Ltd v. Commercial Union Assurance Co of Canada*, 2005 NSSC 62	37, 41, 44, 56

PART VII - STATUTORY PROVISIONS

Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008

Summary judgment on pleadings

13.03(1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

(a) it discloses no cause of action or basis for a defence or contest;

(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) judgment for the plaintiff, when the statement of defence is set aside wholly;

(b) dismissal of the proceeding, when the statement of claim is set aside wholly;

(c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;

(d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question

Jugement sommaire sur les plaidoiries

13.03 (1) Un juge doit annuler une déclaration ou une défense qui s'avère insuffisante en ce qu'elle :

a) ou bien ne révèle ni cause d'action ni défense ou moyen de contestation valable;

b) ou bien présente une demande fondée sur une cause d'action relevant de la compétence exclusive d'une autre cour;

c) ou bien présente autrement une demande ou établit une défense ou un moyen de contestation qui est clairement insoutenable quand la plaidoirie est lue seul.

(2) Quand une plaidoirie est annulée dans les cas suivants, le juge doit rendre un jugement sommaire ainsi qu'il suit :

a) jugement en faveur du demandeur, quand la défense est annulée entièrement;

b) rejet de l'instance, quand la déclaration est annulée entièrement;

c) accueil d'une demande, quand sont annulées toutes les parties de la défense se rapportant à la demande;

d) rejet d'une demande, quand sont annulées toutes les parties de la déclaration se rapportant à la demande.

(3) La motion sollicitant un jugement sommaire sur les plaidoiries doit être tranchée uniquement sur les plaidoiries, et aucun affidavit ne peut être déposé à l'appui de la motion ou contre elle.

(4) Le juge qui instruit une motion sollicitant un jugement sommaire sur les plaidoiries peut ajourner la motion jusqu'après avoir instruit une motion sollicitant la modification des plaidoiries.

(5) Le juge qui instruit une motion sollicitant un jugement sommaire sur les plaidoiries et qui est convaincu de ce qui suit peut trancher une

of law:

(a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;

(b) the outcome of the motion depends entirely on the answer to the question.

question de droit :

a) les allégations de fait substantiel énoncées dans les plaidoiries don't l'annulation est sollicitée fournissent, sur présomption de leur véracité, l'intégralité des faits nécessaires pour qu'elle soit tranchée;

b) le sort de la motion dépend entièrement de la réponse qui sera donnée à la question.

Summary judgment on evidence

13.04(1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

(2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

(4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

(6) The motion may be made after pleadings close

Jugement sommaire sur la prevue

13.04 (1) Le juge qui est convaincu que la preuve ou le manque de preuve établit qu'une déclaration ou une défense ne réussit pas à soulever une véritable questionlitigieuse doit rendre un jugement sommaire.

(2) Le juge peut rendre jugement en faveur du demandeur, rejeter l'instance, accueillir une demande, rejeter une demande ou rejeter une défense.

(3) Dans le cas d'une motion sollicitant un jugement sommaire sur la preuve, les plaidoiries ne servent qu'à indiquer les règles de droit et les faits en litige, et l'existence d'une véritable question litigieuse repose sur la preuve présentée.

(4) La partie qui souhaite contester la motion doit produire une preuve favorable à sa demande ou à sa défense au moyen d'un affidavit qu'elle dépose, d'un affidavit que dépose une autre partie, d'un contre-interrogatoire ou de tout autre moyen que permet un juge.

(5) Le juge qui instruit une motion sollicitant un jugement sommaire peut trancher une question de droit, si la seule véritable question litigieuse est une question de droit.

(6) La motion peut être présentée après la clôture des plaidoiries.

Scope of Rule 55

55.01 (1) This Rule provides procedure about expert opinion, and it does each of the following:

a) requires disclosure of an expert

Champ d'application

55.01 (1) La présente règle arrête la procédure relative à l'opinion d'expert; en outre:

a) elle exige la divulgation de l'opinion

opinion to be offered on a trial or hearing;
b) provides for exclusion of expert opinion evidence that is not disclosed as required;
c) requires experts to make written representations to the court about the independence of the expert and the expert's participation in the proceeding;
d) limits discovery of experts.

d'expert qui sera offerte au procès ou à l'audience;
b) elle prévoit l'exclusion de la preuve d'expert qui n'est pas divulguée telle qu'il est prescrit;
c) elle exige des experts qu'ils présentent à la cour des observations écrites concernant leur indépendance et leur participation à l'instance;
d) elle limite l'interrogatoire préalable des experts.

(2) This Rule does not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible.

(2) La présente règle n'a aucune incidence sur les règles de preuve qui permettent de déterminer si l'opinion d'expert est admissible ou inadmissible.

(3) A party may offer an expert opinion as evidence, in accordance with this Rule.

(3) Une partie peut offrir une opinion d'expert à titre d'élément de preuve, conformément à la présente règle.

Content of expert's report

Contenu du rapport d'expert

55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

55.04 (1) Le rapport d'expert doit être signé par l'expert et indiquer tout ce qui suit à titre d'observations qu'il présente à la cour :

a) l'expert fournit une opinion objective pour prêter assistance à la cour, même si ses services sont retenus par une partie;
b) le témoin est disposé à témoigner au procès ou à l'audience, à se conformer aux directives de la cour et à se former un jugement indépendant dans l'assistance qu'il prête à la cour;
c) le rapport comprend tout ce que l'expert considère pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente;
d) l'expert répondra aux questions écrites que lui poseront les parties le plus tôt possible après qu'elles lui auront été délivrées;
e) l'expert avisera chacune des parties par écrit le plus tôt possible après que son opinion aura changé ou qu'il prendra connaissance d'un fait substantiel qui n'a pas été examiné au moment de la préparation du rapport et qui pourrait raisonnablement avoir une incidence sur l'opinion.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

a) details of the steps taken by the expert in formulating or confirming the opinion;

b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

c) the degree of certainty with which the expert holds the opinion;

d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

a) the expert's relevant qualifications, which may be provided in an attached resumé;

b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

c) reference to all publications of the expert on the subject of the opinion;

d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

e) a statement of the documents,

(2) Le rapport doit comporter un énoncé concis de chacune des opinions de l'expertet contenir tous les renseignements suivants à l'appui de chacune :

a) les détails des démarches entreprises par l'expert pour formuler ou confirmer l'opinion;

b) une explication complète des motifs de l'opinion, y compris les faits substantiels présumés véridiques, les faits substantiels constatés par l'expert, les fondements théoriques de l'opinion, les explications théoriques exclues, la théorie pertinente que l'expert rejette, les questions exorbitantes de l'expertise de l'expert et le nom de la personne que l'expert invoque pour trancher ces questions;

c) le degré de certitude auquel l'expert se forme l'opinion;

d) une réserve que l'expert émet concernant l'opinion en raison du besoin d'un complément d'enquête, de la déférence de l'expert à l'expertise d'autres personnes ou pour tout autre motif.

(3) Le rapport doit comporter les renseignements nécessaires pour évaluer le poids à donner à chaque opinion, y compris :

a) les titres et qualités pertinents de l'expert, lesquels peuvent être fournis dans un curriculum vitae y annexé;

b) le renvoi à toute la documentation et autre matériel faisant autorité que l'expert a consultés pour parvenir à l'opinion et la rédiger, lesquels peuvent figurer dans une liste y annexée;

c) le renvoi à toutes les publications de l'expert traitant du sujet dont relève l'opinion;

d) les renseignements concernant une épreuve ou une expérience effectuée pour formuler ou confirmer l'opinion, lesquels peuvent être fournis en annexant un énoncé des résultats de l'épreuve qui comprend des renseignements suffisants au sujet de l'identité et des titres et qualités d'un tiers, si l'épreuve ou l'expérience n'a pas été effectuée par l'expert;

electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

e) un énoncé des documents, des renseignements électroniques et des autres choses que l'expert a fournis ou acquis pour rédiger l'opinion.

Code of Civil Procedure, CQLR c C-25

418. The expert, before entering upon his functions, must be sworn in writing before the judge or clerk to perform his duties faithfully and impartially. If he refuses or neglects to be sworn or to carry out his duties, any of the parties may request the court to replace him.

418. Avant d'entrer en fonction, l'expert doit donner son serment écrit, devant le juge ou le greffier de remplir ses fonctions fidèlement et avec impartialité; s'il refuse ou néglige de prêter serment ou de procéder à sa mission, l'une ou l'autre des parties peut demander au tribunal de le remplacer.

Court of Queen's Bench Rules, Sask Gaz December 27, 2013, 2684

Duty of expert witness

5-37(1) In giving an opinion to the Court, an expert appointed pursuant to this Division by one or more parties or by the Court has a duty to assist the Court and is not an advocate for any party.

Devoir du témoin expert

5-37(1) Lorsqu'il donne une opinion à la Cour, l'expert nommé en vertu de la présente section par une ou plusieurs parties ou par la Cour a le devoir d'aider la Cour et n'est pas le défenseur d'une partie.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

OBLIGATION DE L'EXPERT

4.1.01 (1) Il incombe à tout expert engagé par une partie ou en son nom pour témoigner dans le cadre d'une instance introduite sous le régime des présentes règles :

a) de rendre un témoignage d'opinion qui soit équitable, objectif et impartial;

b) de rendre un témoignage d'opinion qui ne porte que sur des questions qui relèvent de son domaine de compétence;

c) de fournir l'aide supplémentaire que le tribunal peut raisonnablement exiger pour décider une question en litige. Règl. de l'Ont. 438/08, art. 8.

(2) L'obligation prévue au paragraphe (1) l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé ou au nom de laquelle il a été engagé.

EXPERT WITNESSES

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.

TÉMOIGNAGES D'EXPERTS

Rapports d'experts

53.03 (1) La partie qui se propose d'appeler un expert à témoigner au procès signifie aux autres parties à l'action, au moins 90 jours avant la conférence préparatoire au procès exigée aux termes de la Règle 50, un rapport signé par l'expert et contenant les renseignements énumérés au paragraphe (2.1).

(2) La partie qui se propose d'appeler un expert à témoigner au procès en réponse au témoignage de l'expert d'une autre partie signifie aux autres parties à l'action, au moins 60 jours avant la conférence préparatoire au procès, un rapport signé par l'expert et contenant les renseignements énumérés au paragraphe (2.1).

(2.1) Le rapport produit pour l'application du paragraphe (1) ou (2) contient les renseignements suivants :

1. Les nom, adresse et domaine de compétence de l'expert.
2. Les qualités de l'expert ainsi que son expérience de travail et sa formation dans son domaine de compétence.
3. Les directives données à l'expert en ce qui concerne l'instance.
4. La nature de l'opinion sollicitée et chaque question dans l'instance sur laquelle porte l'opinion.
5. L'opinion de l'expert sur chaque question et, si une gamme d'opinions est donnée, un résumé de la gamme et les motifs de l'opinion de l'expert comprise dans cette gamme.
6. Les motifs à l'appui de l'opinion de l'expert, notamment :
    i. une description des hypothèses factuelles sur lesquelles l'opinion est fondée,
    ii. une description de la recherche effectuée par l'expert qui l'a amené à formuler son opinion,
    iii. la liste des documents, s'il y a lieu, sur lesquels l'expert s'est appuyé pour formuler son

opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

7. Une attestation de l'obligation de l'expert (formule 53) signée par l'expert.

Rules of Civil Procedure, PEI Rules

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

OBLIGATION DE L'EXPERT

4.1.01 (1) Il incombe à tout expert engagé par une partie ou en son nom pour témoigner dans le cadre d'une instance introduite sous le régime des présentes règles :

a) de rendre un témoignage d'opinion qui soit équitable, objectif et impartial;

b) de rendre un témoignage d'opinion qui ne porte que sur des questions qui relèvent de son domaine de compétence;

c) de fournir l'aide supplémentaire que le tribunal peut raisonnablement exiger pour décider une question en litige.

(2) L'obligation prévue au paragraphe (1) l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé ou au nom de laquelle il a été engagé.

EXPERT WITNESSES

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

TÉMOIGNAGES D'EXPERTS

Rapports d'experts

53.03 (1) La partie qui se propose d'appeler un expert à témoigner au procès signifie aux autres parties à l'action, au moins 90 jours avant la conférence préparatoire au procès exigée aux termes de la Règle 50, un rapport signé par l'expert et contenant les renseignements énumérés au paragraphe (2.1).

(2) La partie qui se propose d'appeler un expert à témoigner au procès en réponse au témoignage de l'expert d'une autre partie signifie aux autres parties à l'action, au moins 60 jours avant la conférence préparatoire au procès, un rapport signé par l'expert et contenant les renseignements énumérés au paragraphe (2.1).

(2.1) Le rapport produit pour l'application du paragraphe (1) ou (2) contient les renseignements suivants :

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

1. Les nom, adresse et domaine de compétence de l'expert.
2. Les qualités de l'expert ainsi que son expérience de travail et sa formation dans son domaine de compétence.
3. Les directives données à l'expert en ce qui concerne l'instance.
4. La nature de l'opinion sollicitée et chaque question dans l'instance sur laquelle porte l'opinion.
5. L'opinion de l'expert sur chaque question et, si une gamme d'opinions est donnée, un résumé de la gamme et les motifs de l'opinion de l'expert comprise dans cette gamme.
6. Les motifs à l'appui de l'opinion de l'expert, notamment :
    i. une description des hypothèses factuelles sur lesquelles l'opinion est fondée,
    ii. une description de la recherche effectuée par l'expert qui l'a amené à formuler son opinion,
    iii. la liste des documents, s'il y a lieu, sur lesquels l'expert s'est appuyé pour formuler son opinion.
7. Une attestation de l'obligation de l'expert (formule 53) signée par l'expert.

Rules of Court for the Supreme Court of Yukon, YOIC 2009/65

Duty of expert

(23) In giving an opinion to the court, an expert appointed under this rule has a duty to assist the court and that duty overrides any obligation the expert may have to any party or to any person who is liable for the expert's fee or expenses.

Obligation de l'expert

(23) Lorsqu'il donne une opinion à la cour, l'expert nommé sous le régime de la présente règle a l'obligation d'aider la cour, et cette obligation l'emporte sur toute autre obligation de l'expert envers la partie ou la personne chargée d'acquitter ses honoraires ou ses dépenses.

Supreme Court Civil Rules, B.C. Reg. 168/2009

Rule 11-2 — Duty of Expert Witnesses

Duty of expert witness

(1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by

the court has a duty to assist the court and is not to be an advocate for any party.